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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 943.

CONTINENTAL BAKING COMPANY,
PETITIONER,

VS.

JESSE BUMPUS, RESPONDENT.

REPLY

To the Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit, and on the Merits.

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To the Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit, and on the Merits.

Uncontradicted Determinative Facts.

The Continental Baking Company employed Jesse Watkins Bumpus on January 19, 1938, at a salary of $25 per week for 48 hours service (R. 18).

Mr. Bumpus worked for the petitioner to October 19, 1940 (R. 14), and from October 24, 1938, to October 19, 1940, the petitioner worked Mr. Bumpus 732 1/2 hours overtime—more per week than the Fair Labor Standards Act, Section 7, permitted, and which 732 1/2 hours over-

time Mr. Bumpus was not compensated at 1-1/2 times the rate at which he was employed as required by the act of Congress (R. 22).

Mr. Bumpus' contract having been made with the Continental Baking Company on January 28, 1938, nearly five months, lacking three days, before the Fair Labor Standards Act of 1938 was passed, which was June 25, 1938, and was nine months before this act went into force and effect, which was October 24, 1938.

Mr. R. M. Laughlin, Manager of the Memphis plant, testified that there had never been another contract made with Mr. Bumpus after the law went into effect, and he answered:

"No, there was no change made" (R. 35).

Mr. Bumpus confirmed this when asked if there was any change ever suggested or made in his employment:

"No, sir; never did" (R. 23).

Determinative Parts of the Fair Labor Standards Act of 1938 Involved in This Lawsuit.

"Section 7 (a). No employer shall, * * * employ any of his employees who is engaged in commerce or in the production of goods for commerce.

(1) for a work week longer than forty-four hours during the first year from the effective date of this section.

(2) for a work week longer than forty-two hours during the second year from such date, * * *

Unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

Prohibited Acts.

"Section 15 (a). * * * It shall be unlawful for any person to violate any of the provisions of Section 6 or 7."

Penalties.

"Section 16 (b). Any employer who violates the provisions of Section 6 or Section 7 of this act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages."

"Section 18. No provision of this act shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this act, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this act."

Decisions of the Lower Courts.

District Judge Boyd, on the uncontradicted testimony, decided all the question in favor of Mr. Bumpus except the trial judge held in the teeth of the positive and mandatory act of Congress as follows:

"But there is not anything in it, as I see it, and I have in mind principally the sections relied upon by the plaintiff, which would upset this contract between these parties" (R. 67).

A unanimous court of the sixth circuit reversed Judge Boyd's opinion and held for Mr. Bumpus (R. 72-78, incl.).

Questions Presented in This Case.

Petitioner presents what it calls two propositions

(1) whether or not the contract, made five months before the act of Congress was made, and nine months before the Fair Labor Standards Act went into force and effect on October 24, 1938, without change of terms in the contract of employment, was abrogated and rendered illegal,

(2) if and rendered illegal, the act is unconstitutional as violating the obligations of a contract (Brief p. 2).

These Propositions of Law Have Been Settled for 132 Years.

In 1810 in the case of *Atkinson* v. *Ritchie*, 10 East 530, 534 (KB), Chief Justice Lloyd Ellenborough said that the question could not be doubted at that early date, and,

> "That no contract * * * being made consistent with the rules of law at the time, has become illegal in virtue of some subsequent law, would admit of no doubt."

In 1870—72 years ago in *Legal Tender Cases*, 12 Wall. 550, 551, the court, speaking through Mr. Justice Strong, upon the *exercising of a power granted to Congress to regulate money*, said:

> "Contracts must be understood as made in reference to the possible exercise of rightful authority of the government, and no obligation of a contract can extend to defeat of legitimate government authority."

The Constitution of the United States in 1789, Article I, Section 1, said:

> "All legislative power herein granted shall be vested in a Congress."

There are now 33 powers granted to Congress and under Article I, Section 8, it is provided:

> "The Congress shall have power, * * * to regulate commerce * * * among the several states."

In 1910, 32 years ago, in the case of *L. & N. R. R. Co.* v. *Motley*, 219 U. S. 467, in a unanimous opinion by that great jurist, Mr. Justice Harlan, where the act of Congress, June 29, 1906, prohibited the issuance of "railroad passes" and the question was whether or not a contract made by a railroad to furnish to Motley yearly a pass (or 35 years before the act of Congress was enacted) was valid or whether or not the prohibition of the act of Congress must prevail, and the court held that the railroad pass contract must yield to the act of Congress and said:

> "If that principle be not sound, the result would be that individuals and corporations could, by contracts between themselves, in anticipation of legislation, render of no avail the exercise by Congress, to the full extent authorized by the Constitution, of its power to regulate commerce. *No power of Congress can be thus restricted.*"

The same was held in the *Second Employers Liability Cases*, 223 U. S. 1, 52; and in the antitrust laws, *Addyston Pipe & Steel Co.* v. *U. S.*, 175 U. S. 211, 229, 230.

And as late as 1934, in the "gold clause" causes, *Norman* v. *B. & M. R. R. Co.*, 294 U. S. 307, 309, Mr. Chief Justice Hughes, speaking for the court, said:

> "Contracts, however express, cannot fetter the constitutional authority of the Congress.
>
> "Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of Congress, they have a congenital infirmity.
>
> Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them."

In *United States* v. *Darby*, 312 U. S. 100, the court said:

> "It is no longer open to question that it is within the legislative power to fix maximum hours."

It is unfortunate that this the highest court of our nation that does such a tremendous amount of important work of the nation is to have its calendar filled with such cases where the fundamental laws have been so thoroughly settled.

Mr. Justice Swayne, in an epoch making decision, beautifully expressed the duty of this court involving this power expressly given to the Constitution of the United States to Congress:

> "Wherever 'commerce among the states' goes, the power of the nation, as represented in this court, goes with it to protect and enforce its rights." *Gilliam* v. *Philadelphia*, 70 U. S. 713, 18 L. Ed. 96, 99, c & f. *Re Debs*, 158 U. S. 565, 593."

It was a most unfortunate human error for the trial judge to hold contrary to what has been the law for 132 years. It would have been amazing for the Circuit Court of the Sixth Circuit, we think one of the best in the United States, to have reached any other result than it did in this case reversing the trial court (R. 72-78, incl.).

Construction of the Fair Labor Standards Act of 1938.

Section 7 says:

> "No employer shall * * * employ any of his employees who is engaged in commerce * * * (1) for a work week longer than forty-four hours, (2) For a work week longer than forty-two hours * * * unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

The answer to the discovery made under oath (R. 10, 11, 12, 13) showed that Continental Baking Company worked Mr. Bumpus 732 1/2 hours overtime, more than this mandatory language permitted unless Mr. Bumpus was paid one and one-half times the regular rate at which he was employed, when, as we turn to the contract made five months before the act of Congress and nine months before this act of Congress went into force and effect (R. 21), Mr. Bumpus was employed to work 48 hours per week for $25 salary. Then, as a very simple mathemetical calculation (not requiring the great Alfred Einstein theory of "relativity"), this gives as answer $0.5208 plus per hour as rate "at which he is employed," and 1 1/2 times for overtime would make $0.7612 plus per hour. Mr. Bumpus, when he worked less than statutory maximum hours, was

paid on this basis. The basis set forth on pages 12-13, brief, *is wholly without evidence, to sustain it,* and seems to be only an idea thought up, *after lawsuit was on appeal.*

Section 15 of this Act says:

> "It shall be unlawful for any person * * * to violate any of the provisions of Section 6 *or* Section 7."

Section 16 (b) provides for penalties if either one of Section 6 *or* Section 7 is violated, and provides the additional penalties.

This act of Congress "regulating commerce among the several states" is evidently fashioned after the Oregon state law which was discussed and held in the case of *Bunting* v. *Oregon*, 243 U. S. 426, the law and the penalty valid, and said:

> "The provision for overtime is permissive, in the same sense that any penalty may be said to be permissive. Its purpose is to deter by its burden, and its adequacy for this was a matter of legislative judgment under the particular circumstances. It may not achieve its end, but its insufficiency cannot change its character from penalty to permission."

It must not be lost sight of in construing this act that not only does Section 7 of maximum hours stand on its own foundation and forbid the working of an employee overtime unless the employee is paid 1 1/2 times the regular rate at which he is employed, but Section 15 (a) provides that it shall be unlawful to "violate Section 6 *or* Section 7" and the penalty provided in Section 16 (b) is for the violation of the provisions of "Section 6 *or* Section 7" of this act. The disjunctive "or" must not be overlooked or not considered.

In the case of *United States* v. *Hutcheson*, 312 U. S. 219, 235, the court construing an act of Congress said:

> "Such legislation must not be read in a spirit of mutilating narrowness."

The court, further quoting Mr. Justice Holmes, said:

> "A statute may indicate or require as its justification a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur to the mind. The legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed."

No Sound Reason Is Given Why Certiorari Should Be Granted in This Case.

The court of appeals in the case reached the only sound and logical conclusion that could be reached without doing violence to and destroying the act of Congress which this court had sustained in the Darby case, and the court of appeals' opinion citing and approving six well-reasoned wage and hour reported cases (R. 76) and the only case that seemed to contradict the positive language of Congress was the *Missel Case*, 40 Fed. Supp. 174, and that case has been overruled by the Fourth Circuit Court of Appeals, not yet reported.

The *Belo Case*, 121 F. 2d 207, from the fifth circuit "is distinguished on its facts as is clear" (R. 76).

This case was distinguished in *Klotz* v. *Ippolito*, 40 Fed. Supp. 422. This was cited and followed as correct by the Fifth Circuit Court of Appeals on December 1, 1941, in the case *Super-Cold S. W. Co.* v. *McBride* (not yet reported).

Therefore there *are no federal decisions with the identical and determinative facts identical to the holdings of the Sixth Circuit Court of Appeals in this case; and cases that have not the same facts do not justify or warrant this court to grant a certiorari to review and overrule those cases that have different determinative facts.* If this course were pursued by this court its labors would be unnecessary and too great a burden. Such labors would lead to great confusion and discussion of cases that are not determinative of the facts involved in this case, and invade the "realm of debate, not decision."

We think that the cases relied upon by petitioner have no more application to the facts in Bumpus case than does the Dartmouth College case or the case of *Richard Roe* v. *John Doe*—the facts in those cases cited do not fit the facts in the Bumpus case any more than would the skin of a flea fit the body of a Jumbo elephant.

Therefore, we sincerely urge and insist that a certiorari should not be granted in this case to add to the calendar of this court to review cases not involving the same facts as exist in the Bumpus case.

The question that the Continental Baking Company has presented in this case only one assignment of error on page 2 of its brief, involving the constitutionality of act and validity of the contract, has not only been decided in the *Darby Case*, 212 U. S., but was settled 32 years ago in the Motley case and was thought, there was no doubt about it, 132 years ago by Chief Justice Lord Ellenborough in the Atkinson case in 1810.

While to appear before this, the highest court of the nation, to argue a constitutional question, may swell most lawyers to the point of bursting with pride, the constitutional question in this case has been settled for 71 years in the Legal Tender Cases, and the question was not doubted by the King's Bench of England 132 years ago, it seems an unnecessary burden that this court should grant a certiorari in this case. Therefore to argue these questions again would but bring additional burdens on this court, especially since this court said in the Barby case:

> "Nor is *it any longer open to question* that *it is within the legislative power* to fix maximum hours." 312 U. S. 100.

Respectfully submitted,

WILLIAM G. CAVETT,
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Attorney for Respondent.

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 943

CONTINENTAL BAKING COMPANY, PETITIONER

v.

JESSE BUMPUS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM ON BEHALF OF THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE

The Administrator of the Wage and Hour Division of the United States Department of Labor is charged with the responsibility and duty of administering the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060; 29 U. S. C., sec. 201, et seq., hereinafter referred to as the Act). Because this case involves important questions of interpretation of the Act, and of the

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rights and obligations of employers and employees thereunder, the Solicitor General submits this memorandum on behalf of the Administrator, as *amicus curiae,* in order to present the views of the Government concerning the desirability of granting a writ.

The validity of the Administrator's method of computing overtime pay pursuant to Section 7 of the Fair Labor Standards Act of 1938, and the legality of contractual efforts to set the "regular rate" of pay within the meaning of that section, are presented for decision in *Holland, Administrator* v. *A. H. Belo Corporation,* No. 622, certiorari granted October 27, 1941. The question whether Section 7 applies at all where the employee's weekly compensation at least equals the statutory minimum for straight time and time and one-half that minimum for the remaining hours is presented in *Overnight Transportation Company, Inc.* v. *Missel,* No. 939, certiorari granted February 16, 1942, and assigned for argument following No. 622. The present case presents the question, closely related to the foregoing, whether an employment contract entered into prior to the Act and providing for a salary of $25 per week of 48 hours, was automatically adjusted when the Act became effective so as to satisfy the requirements of Section 7 by allocating a portion of the weekly compensation to the hours within the statutory maximum, and the remainder of the compensation to the excess hours

at a rate one and one-half times the presumed rate for hours up to the maximum.[1]

We believe that the decision of the Circuit Court of Appeals is plainly correct in refusing to sanction petitioner's attempt to avoid the requirements of Section 7 by arithmetical manipulation. However, in the interests of a comprehensive disposition of difficult and frequently arising controversies concerning the proper construction of Section 7, it would be helpful to have the Court examine this additional facet of the question involved in the *Belo* and *Overnight Motor Transportation* cases.

In the event that a writ is issued, it is respectfully submitted that the case should be assigned to follow Nos. 622 and 939.

CHARLES FAHY,
Solicitor General.

WARNER W. GARDNER,
Solicitor, Department of Labor.

MARCH 1940.

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[1] When the statutory maximum was reduced from 44 to 42 hours at the end of the first year of the Act's operation, a further automatic adjustment assertedly occurred, with the result that the rate for "straight time" diminished but the proportion between it and the overtime rate remained constant (Pet. 13).

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